

1 KAREN A. OVERSTREET
Bankruptcy Judge
2 United States Courthouse
700 Stewart St., Suite 6310
3 Seattle, WA 98101
206-370-5330
4

5 UNITED STATES BANKRUPTCY COURT
6 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 In re)
8 JILL JENSEN-AMES,) Chapter 11
9)
Debtor.)
10) Bankruptcy No. 10-14185
11)
12 JOHN GELBER and TERRY SMITH,) Adversary No. 10-01684
a married couple,)
13)
Plaintiffs.)
14)
v.) **MEMORANDUM DECISION ON**
15) **MOTION FOR SUMMARY JUDGMENT**
16 JILL JENSEN-AMES and JEREMY) **NOT FOR PUBLICATION**
AMES, and the marital)
17 community composed thereof,)
Defendants.)
18)

19
20 This matter came before the Court on March 4, 2011, on the
21 motion for summary judgment filed by plaintiffs John Gelber and
22 Terry Smith. Plaintiffs' motion seeks summary judgment that
23 defendants are liable to Mr. Gelber in the amount of \$86,954.26 and
24 to Ms. Smith in the amount of \$22,341.59 and that such obligations
25 are nondischargeable under Bankruptcy Code § 523(a)(19).¹ The

26
27 ¹ Unless otherwise indicated, all Code, Chapter, Section and
28 Rule references are to the Bankruptcy Code, 11 U.S.C. §§101 *et seq.*
and to the Federal Rules of Bankruptcy Procedure, Rules 1001 *et seq.*

1 Court has considered the plaintiffs' pleadings and declarations as
2 well as the responsive pleadings and declarations filed by
3 defendants Jeremy Ames and Jill Jensen-Ames. For the following
4 reasons, the Court finds that plaintiff Smith is entitled to
5 summary judgment against Ms. Jensen-Ames and her marital community,
6 but plaintiff Gelber is not entitled to summary judgment against
7 the defendants.

8 I. JURISDICTION

9 The Court has jurisdiction of this matter pursuant to 28
10 U.S.C. §§ 157 and 1334 and this is a core proceeding under 28
11 U.S.C. § 157(b)(2)(I), (J).

12 II. FINDINGS OF FACT

13 The Court makes the following findings of fact.

14 Defendant Jill Jensen-Ames ("Ms. Jensen-Ames") is a real estate
15 agent who worked with mortgage broker Katherine Swanberg ("Ms.
16 Swanberg"). Declaration of Terry Smith (Dkt. #14, "Smith Decl."),
17 ¶¶1-5. Defendant Jeremy Ames is the spouse of Ms. Jensen-Ames.
18 Answer, Dkt. #5, ¶1. Ms. Jensen-Ames and Ms. Swanberg advertised
19 and hosted seminars on investment opportunities. Smith Decl. ¶5-6.

20 In July 2006, Ms. Jensen-Ames invited plaintiff John Gelber
21 ("Mr. Gelber") to a seminar regarding investment opportunities in
22 land in Nicaragua known as the Seaside Marina Spa & Golf Resort
23 ("Seaside Marina"). Declaration of John Gelber (Dkt. #13, "Gelber
24 Decl."), ¶2-8, Exhibit B. Mr. Gelber has never been to Nicaragua.
25 Gelber Decl., ¶16. On August 3, 2006, Mr. Gelber bought a
26 purchase option for a lot in Seaside Marina for \$29,000. Mr.
27 Gelber traded up for a golf course lot a few days later for an
28 additional \$35,000. Gelber Decl., Ex. E.; Declaration of Jill

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1 Jensen-Ames (Dkt. #20, "Jensen-Ames Decl."), Exhibit, J, K.

2 The Seaside Marina project was pitched by Ms. Jensen-Ames as a
3 group investment in her solicitation emails:

4 Right now I am gathering an interest list to
5 see who may be interested in partnering with me
6 for these developments. If there is enough
7 interest I will be putting together a
8 presentation to show pictures and explain the
9 different projects. There are several
10 different strategies and projects including
11 short term land development, vacation rental,
12 resort/hotel ownership, with long term cash
13 flow. This may also be a great place to invest
14 an IRA. Ideally we are looking for a minimum
15 investment of \$50,000 per person.

16 Gelber Decl., Ex. A (Email from Ms. Jensen-Ames). Under the Offer
17 to Purchase between Nicaragua Developments S.A. (the seller) and
18 Nicaragua Horizons LLC (the purchaser), the purchaser agreed to
19 acquire the entire project for a purchase price of \$350,000.

20 Jensen-Ames Decl., Ex. L. The Seaside Marina project required
21 substantial involvement from third parties in terms of development
22 before any investor would realize a profit on his or her
23 investment. Gelber Decl., Ex. C.

24 The Lot Reservation and Priority Position Agreement for
25 Seaside Marina, between Nicaragua Horizons LLC and the Gelber IRA,
26 states

27 this Agreement is neither an offer to sell nor
28 a sale of the Lot or the Property, that the Lot
or the Property may or may not be available for
sale, and that prior to the execution of the
Option Agreement, this Agreement may be
cancelled by either party upon written notice
to the other party.

Jensen-Ames Decl, Ex. K, ¶ 7. However, the Option Agreement to
Acquire Purchase Rights ("Option Agreement"), grants Mr. Gelber the
right to take title to a lot as soon as it is acquired. Gelber

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1 Decl., Exhibit E, ¶¶ 4, 5.

2 The funds used to purchase the Seaside Marina lot were paid by
3 a check from Equity Trust Company Custodian FBO John Lewis Gelber
4 IRA. Equity Trust Company, as custodian for plaintiffs' IRAs, was
5 the party to the relevant agreements at issue in this case.
6 Jensen-Ames Decl., Ex. E, I, K; Smith Decl., Ex. C. Equity Trust
7 is a self directed IRA custodian, and Mr. Gelber and Ms. Smith each
8 have real estate IRAs through Equity Trust. Gelber Decl. ¶12.,
9 Exhibit D.

10 Ms. Smith met with Ms. Jensen-Ames in March 2007 to discuss
11 investing in a different real property project in Nicaragua known
12 as Los Congos. Smith Decl. ¶14. Ms. Smith has also never been to
13 Nicaragua. Smith Decl., ¶24. Ms. Smith paid \$17,000 under a Lot
14 Reservation Agreement for a lot in Los Congos. Smith Decl., ¶15;
15 see also Lot Reservation Agreement, Smith Decl., Exhibit C. The
16 "Buyer" under the Lot Reservation Agreement was Equity Trust
17 company, Custodian, FBO Terry Smith IRA. Smith Decl., ¶17; see
18 also Lot Reservation Agreement, Smith Decl., Exhibit C.

19 At the time Ms. Smith made her investment, individual lots in
20 the Los Congos Project were not available for purchase because
21 significant permitting and development was still needed. Smith
22 Decl., Exhibit C, F, G. Although Ms. Smith thought she was
23 investing in a particular parcel of property in Los Congos, the
24 agreements reflect that the title to the property would not pass to
25 her. Smith Decl., Exhibit C. Instead, Ms. Smith authorized
26 Ms. Swanberg, acting in concert with Ms. Jensen-Ames, to accept
27 title to the lots. Under the Lot Reservation Agreement, the Los
28 Congos lots were to be held and sold by Laguna SA. Smith Decl.,

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1 Exhibit C. The Lot Reservation Agreement refers to the bulk sale
2 of 20 lots, and says that "the investors will retain the earnings
3 from the retail sales." Smith Decl., Exhibit C. There is no
4 document providing for the transfer of any specific parcel of
5 property to Ms. Smith, and no document evidencing that Ms. Smith
6 had any control over the Los Congos project. Ms. Smith believed
7 that she would not take title to the property, but rather that she
8 would be entitled to proceeds upon the sale of "her lot." Smith
9 Decl., ¶21. All of the Los Congos investors' funds were placed
10 into a single escrow account for purposes of purchasing the Los
11 Congos properties. Jensen-Ames Decl. ¶9. The funds were
12 transmitted to the developer in a single wire transfer. *Id.* The
13 transactional document with "Society Luguna" states that the lots
14 will be sold to Ms. Swanberg for \$806,000. Smith Decl., Exhibit C.
15 The document refers to the "group of investors represented by
16 Katherine Swanberg...." Smith Decl., Exhibit C, page 9. None of
17 the investors were individually named. Smith Decl., Exhibit C. In
18 an April 18, 2008, update on the status of the project from Jeffrey
19 Finch to Ms. Jensen-Ames and Ms. Swanberg, the developer describes
20 activities related to permitting and development of the project,
21 and repeatedly refers to the "investor group." Smith Decl.,
22 Exhibit F.

23 Neither the Seaside Marina investment offering nor the Los
24 Congos investment offering were registered as a security pursuant
25 to RCW 21.20.140. Ms. Jensen-Ames was not a registered securities
26 salesperson under RCW 21.20.040.

27 The Washington Department of Financial Institutions ("DFI")
28 investigated the Los Congos transaction, and issued a Statement of

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1 Charges and Notice of Intent to Enter an Order to Cease and Desist
2 on December 23, 2009. Declaration of Stacy Goodman ("Goodman
3 Dec."), Ex. A. Ms. Jensen-Ames entered into a Consent Order with
4 DFI under which she neither admitted nor denied the findings and
5 conclusions contained in the Statement of Charges. Goodman Decl.
6 Ex. B. The Consent Order incorporates by reference the Statement
7 of Charges. Goodman Decl. Ex. B, p. 1. The Statement of Charges
8 includes the following conclusions of law:

9
10 (1) The offer and/or sale of Los Congos
11 investment opportunity constitutes the offer or
12 sale of a security as defined in RCW
21.20.005(10) and (12). The investment
opportunity meets the definition of an
investment contract.

13 (2) The offer and/or sale of said securities
14 violated RCW 21.20.140, the securities
15 registration provision of the Securities Act,
because Laguna S.A. offerings were not
registered in the State of Washington.

16 (3) The offer and/or sale of said securities
17 was made in violation of RCW 21.20.040, the
18 provision of the Securities Act which requires
19 registration of securities salespersons and
20 broker-dealers, because Respondents [including
defendant Jensen-Ames] sold securities while
not registered as a securities salesperson or
broker-dealer in the State of Washington.

21 Goodman Decl., Ex. A. DFI focused on the fact that Laguna SA was
22 to retain title to the Los Congas properties in reaching its
23 conclusion that the transaction was an investment. Goodman Decl.,
24 Ex. A, pp. 2-5.

25 Ms. Jensen-Ames filed a petition for relief under Chapter 11
26 of the Bankruptcy Code on April 15, 2010. Case No. 10-14185, Dkt.
27 #1. The Consent Order with DFI was executed by Ms. Jensen-Ames on
28 May 20, 2010, after the bankruptcy case was filed. On July 23,

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1 2010, Ms. Jensen-Ames filed a motion in her bankruptcy case for
2 approval of the settlement with DFI. Ms. Jensen-Ames attached a
3 copy of the Consent Order to the motion. Case No. 10-14185, Dkt.
4 44, Exhibit B. In the motion, Ms. Jensen-Ames summarized the
5 charges against her in the Statement of Charges, and stated that
6 she disputed the charges but determined that it was in her interest
7 to settle the matter rather than incur significant legal fees in
8 contesting the charges. Case No. 10-14185, Dkt. 44, pp. 2-3. On
9 September 10, 2010, this Court entered an order approving the
10 settlement by way of the Consent Order. Case No. 10-14185, Dkt. 56.

11 There is no evidence that the Consent Order was executed by
12 the DFI, or that it was filed with any other court. Jensen-Ames
13 Decl., ¶16.

14 **III. CONCLUSIONS OF LAW**

15 Based upon the foregoing findings of fact, the Court makes the
16 following conclusions of law.

17 **A. Summary Judgment Standard.**

18 To prevail on a motion for summary judgment, the moving party
19 must show by reference to pleadings, discovery, admissions, and
20 affidavits, if any, that "there is no genuine issue as to any
21 material fact and that the moving party is entitled to a judgment
22 as a matter of law." Rule 56(a)(c), Fed.R.Civ.P.; Rule 7056. If
23 the moving party meets its burden, the burden of production then
24 shifts to the nonmoving party, who must produce by admissible
25 evidence "specific facts showing that there is a genuine issue for
26 trial." Rule 7056(e). The moving party is entitled to a judgment
27 as a matter of law if the nonmoving party has failed to make a
28 sufficient showing on an essential element of its case with respect

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1 to which it has the burden of proof. *Celotex Corp. v. Catrett*, 477
2 U.S. 317, 91 L.Ed. 2d 265, 106 S.Ct. 2548 (1986). See also *In re*
3 *Irizarry*, 171 B.R. 874 (9th Cir. BAP 1994).

4 **B. Standing - Real Party in Interest.**

5 Defendants contend that the plaintiffs are not the real
6 parties in interest in this proceeding because they are not parties
7 to the contracts at issue. Instead, the trustees of their
8 retirement accounts are parties to the contracts. Plaintiffs
9 respond that because they are the express and intended
10 beneficiaries of the Investment Retirement Account (IRA) entities,
11 which were parties to the agreements at issue, they are the real
12 parties in interest and may prosecute these actions in their names.

13 Rule 17, Fed.R.Civ.P., requires "every action shall be
14 prosecuted in the name of the real party in interest" and by the
15 person or entity with the "capacity to sue." Rule 17 allows a
16 federal court to entertain a suit at the instance of any party to
17 whom the relevant substantive law grants a cause of action. *U-Haul*
18 *Intern., Inc. v. Jartran, Inc.*, 793 F.2d 1034 (9th Cir. 1986).
19 Here, the substantive law is found in the Bankruptcy Code and
20 Federal Rules of Bankruptcy Procedure. Under Rule 4007(a),
21 Fed.R.Bank.P., a debtor or any creditor may file a complaint to
22 obtain a determination of the dischargeability of any debt. A
23 "creditor" is defined under Section 101(10), in relevant part, as
24 an entity that has a claim against the debtor that arose at the
25 time of or before the order of relief concerning the debtor.
26 Moreover, under Section 101(5) a "claim" means a right to payment,
27 or right to an equitable remedy for breach of performance if such
28 breach gives rise to a right to payment.

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1 The word "claim" in the Bankruptcy Code generally refers to
2 the right to payment recognized under state law, since the basic
3 rule in federal bankruptcy proceedings is that state law governs
4 the substance of claims against the debtor's estate. *Travelers,*
5 *Cas. and Sur. Co. of America v. Pacific Gas and Electric Co.*, 127
6 S.Ct. 1199 (2007). Under Washington law, when one person for
7 valuable consideration contracts with another to perform some act
8 for the benefit of a third person, that third person who would
9 enjoy the benefit of the act may maintain an action for breach of
10 such contract. *Grand Lodge of the Scandinavian Fraternity of*
11 *America, Dist. No. 7 v. U.S. Fidelity & Guaranty Co.*, 2 Wash.2d
12 561, 569 (1940). See also *Wolfe v. Morgan*, 11 Wash. App. 738 (Div.
13 1 1974) (holding that donee third party beneficiaries are entitled
14 to sue to enforce the contractual obligations assumed by the actual
15 parties to the contract).

16 In this case, Equity Trust Company, as custodian for
17 plaintiffs' IRAs, was the party to each of the relevant agreements
18 at issue. See Jensen-Ames Decl., Ex. I and K; Gelber Decl., Ex. E;
19 and Smith Decl., Ex. C. The agreements, however, expressly
20 indicate that Equity Trust Company is operating for the benefit of
21 (e.g. "fbo") both John Gelber and Terry Smith. Therefore, the
22 Court finds that John Gelber and Terry Smith were the express and
23 intended third-party beneficiaries of the agreements. As such, the
24 plaintiffs have a right to sue to enforce the terms of the
25 agreements. Because the plaintiffs have such a right, which arose
26 prior to the filing of Ms. Jensen-Ames' bankruptcy, they have a
27 "right to payment" sufficient to support a claim in bankruptcy,
28 thereby making each a creditor. As creditors, plaintiffs have

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1 standing to pursue their complaint to determine the
2 dischargeability of the debt.

3 **C. Burden of Proof.**

4 Plaintiffs have the burden of proving each element of Section
5 523(a)(19) by a preponderance of the evidence.

6 **D. The Claim of Plaintiff Smith.**

7 It is undisputed that Ms. Smith invested \$17,000 in the Los
8 Congos project. Section 523(a)(19) renders nondischargeable debts
9 for violation of state or federal securities laws, provided
10 plaintiffs can meet the requirements of the two subsections of
11 Section 523(a)(19). Section 523 provides that a discharge does not
12 discharge any debt

13 (19) that—

14 (A) is for—

15 (i) the violation of any of the Federal
16 securities laws (as that term is defined in
17 section 3(a)(47) of the Securities Exchange Act
18 of 1934), any of the State securities laws, or
19 any regulation or order issued under such
20 Federal or State securities laws; or

21 (ii) common law fraud, deceit, or manipulation
22 in connection with the purchase or sale of any
23 security; and

24 (B) results, before, on, or after the date on
25 which the petition was filed, from—

26 (i) any judgment, order, consent order, or
27 decree entered in any Federal or State judicial
28 or administrative proceeding;

(ii) any settlement agreement entered into by
the debtor; or

(iii) any court or administrative order for any
damages, fine, penalty, citation,
restitutionary payment, disgorgement payment,
attorney fee, cost, or other payment owed by
the debtor.

1. **Section 523(a)(19)(A).**

Under Subsection (A), the Court must determine whether the Ms.
Smith debt is for a violation of any state securities law. There

1 are two ways to find that (A) is met in this case. First, the
2 Court could find that the Consent Order establishes Ms. Jensen-
3 Ames' liability for a securities violation under Washington state
4 law. Second, the Court could determine that the undisputed facts
5 lead to a conclusion as a matter of law that Ms. Jensen-Ames owes
6 Ms. Smith a debt for violation of the Washington securities law.

7 Under RCW 21.20.140, it is unlawful in Washington to offer or
8 sell any "security" unless the security is registered or the
9 security is exempt.² The Consent Order incorporates by reference
10 the Statement of Charges, which concludes that Ms. Jensen-Ames
11 violated this statute by selling an unregistered security in the
12 form of an interest in the Los Congos project. Ms. Jensen-Ames
13 does not dispute that she signed the Consent Order but insists that
14 she has never seen a copy of that order executed by the DFI.
15 Indeed, the copy of the Consent Order attached as Exhibit B to the
16 Smith Decl. is not signed by a representative of the DFI nor is
17 there any indication that it was filed in any court. Given the
18 lack of proof that the Consent Order has become effective by
19 approval of the DFI, the Court finds on summary judgment that the
20 order does not conclusively establish that Ms. Jensen-Ames violated
21 Washington securities laws.

22 Even if the Consent Order does not establish Ms. Jensen-Ames'
23 liability for a securities violation, however, the Court finds that
24 the undisputed facts in the case mandate a finding that she did
25 violate state securities laws in selling Ms. Smith the interest in

26
27 ² Defendants have not argued that if the alleged "securities"
28 at issue meet the definition of a security under Washington law, an
exception applies.

1 the Los Congos project. RCW 21.20.005(12)(a) defines a "security"
2 as

3 [A]ny note; stock; treasury stock; bond;
4 debenture; evidence of indebtedness;
5 certificate of interest or participation in any
6 profit-sharing agreement; collateral-trust
7 certificate; preorganization certificate or
8 subscription; transferable share; investment
9 contract; investment of money or other
10 consideration in the risk capital of a venture
11 with the expectation of some valuable benefit
12 to the investor where the investor does not
13 receive the right to exercise practical and
14 actual control over the managerial decisions of
15 the venture; voting-trust certificate;
16 certificate of deposit for a security;
17 fractional undivided interest in an oil, gas,
18 or mineral lease or in payments out of
19 production under a lease, right, or royalty;
charitable gift annuity; any put, call,
straddle, option, or privilege on any security,
certificate of deposit, or group or index of
securities, including any interest therein or
based on the value thereof; or any put, call,
straddle, option, or privilege entered into on
a national securities exchange relating to
foreign currency; or, in general, any interest
or instrument commonly known as a "security,"
or any certificate of interest or participation
in, temporary or interim certificate for,
receipt for, guarantee of, or warrant or right
to subscribe to or purchase, any security under
this subsection. This subsection applies
whether or not the security is evidenced by a
written document.

20 Under federal law, a security is "a contract, transaction or
21 scheme whereby a person invests his money in a common enterprise
22 and is led to expect profits solely from the efforts of the
23 promoter or a third party." *SEC v. W.J. Howey Co.*, 328 U.S. 293,
24 298-99 (1946). Washington courts apply the following modified
25 *Howey* test in defining a security: (1) an investment of money, (2)
26 in a common enterprise, and (3) the efforts of the promoter or a
27 third party must have been fundamentally significant ones that
28 affected the investment's success or failure. *Cellular*

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1 *Engineering, Ltd. v. O'Neill*, 118 Wash.2d 16, 24, 820 P.2d 941
2 (1991).

3 The documents executed by Ms. Smith, which are attached to her
4 declaration filed in support of the motion for summary judgment,
5 demonstrate that the investment she made in Los Congos was the
6 purchase of a security within the meaning of the above cited
7 authorities. Although Ms. Smith thought she was investing in a
8 particular parcel of property in Nicaragua, the agreements reflect
9 that the title to that property would not pass to her. Instead,
10 she authorized Katherine Swanberg, acting in concert with
11 Ms. Jensen-Ames, to accept title to 16 lots to be held by Laguna
12 SA, the entity which was to own and develop the project. The Lot
13 Reservation Agreement, attached as Ex. C to the Smith Decl., refers
14 to the bulk sale of 20 lots and that "the investors will retain the
15 earnings from the retail sales." Further, the documents state that
16 the property (referred to as 16 lots) will be sold to Ms. Swanberg
17 for \$806,000, and specifically to the "group of investors
18 represented by Katherine Swanberg...." There is no document
19 providing for the transfer of any specific parcel of property to
20 Ms. Smith and no document evidencing that she had any control over
21 the Los Congos project.

22 Ms. Smith's declaration makes it clear that she was looking to
23 Ms. Jensen-Ames and others to develop the property, market it, sell
24 it, and remit the profit to Ms. Smith. See Smith Decl., ¶¶ 19-22.
25 Ms. Smith had never been to Nicaragua and did not have any control
26 over the activities related to the sales or development of Los
27 Congos. *Id.* at ¶ 23, 24. Instead, the evidence reflects control
28 of the project by Ms. Jensen-Ames, Ms. Swanberg, and the local

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1 developer of the property. Exhibit F to the Smith Decl., an April
2 18, 2008, update on the status of the project, describes all of the
3 activities related to permitting and development of the project,
4 and repeatedly refers to the "investor group." At the time
5 Ms. Smith made her investment, individual lots in the Los Congos
6 project were not ready for purchase in that significant permitting
7 and development was still required to be done.

8 Ms. Jensen-Ames denies that she pooled investors' funds for
9 the Los Congos property but admits that she had all of the
10 investors' money placed in a single escrow account and transmitted
11 to the developer in a single wire transfer. Decl. of Jensen-Ames,
12 ¶ 9. Pooling was required by the underlying transactional
13 documents, however. The transactional agreement is between
14 "Society Laguna" and Ms. Swanberg on behalf of a group of
15 "investors." Smith Decl., Ex. C. None of the investors was named
16 in the agreement and none of their funds were held in escrow for
17 them pending the sale of an individual parcel to them.

18 The Court finds that within the meaning of RCW
19 21.20.005(12)(a), Ms. Smith made an "investment of money or other
20 consideration in the risk capital of a venture with the expectation
21 of some valuable benefit to the investor" where she did not
22 "receive the right to exercise practical and actual control over
23 the managerial decisions of the venture...." On these facts, the
24 Court finds that the transaction with Ms. Smith constituted (1) an
25 investment of money, (2) in a common enterprise, (3) in which the
26 efforts of the promoter or a third party were fundamentally
27 significant ones that affected the investment's success or failure.
28 Like the investment in *Howey*, the Los Congos investment was

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1 marketed as more than just a fee simple interest in land, but
2 instead as the opportunity to invest in a large project that would
3 be developed and marketed by third parties whose efforts would
4 produce a profit that would be shared. *Howey*, at 1103.
5 Characterizing the transaction as an option to purchase real estate
6 served "as a convenient method of determining the investors'
7 allocable shares of the profits." *Id.*

8 Ms. Smith's testimony establishes that the salesperson who
9 dealt directly with her was Ms. Jensen-Ames. There is no dispute
10 that the Los Congos investment offering was not registered as
11 required by RCW 21.20.140 and that Ms. Jensen-Ames was not a
12 registered securities salesperson under RCW 21.20.040.
13 Accordingly, the Court concludes that the undisputed facts
14 demonstrate that the debt of Ms. Smith is for a violation of a
15 state securities law.

16 **2. Section 523(a)(19)(B).**

17 Having met the requirements of subsection (A) of 523(a)(19),
18 Ms. Smith must meet the requirements of Section 523(a)(19)(B) that
19 the debt "result from" (i) a judgment, order, consent order, or
20 decree entered in any Federal or State judicial or administrative
21 proceeding; (ii) any settlement agreement entered into by the
22 debtor; or (iii) any court or administrative order for any damages,
23 fine, penalty, citation, restitutionary payment, disgorgement
24 payment, attorney fee, cost, or other payment owed by the debtor;
25 provided that any of the foregoing, if applicable, were entered
26 before, on or after the petition date in the bankruptcy case.
27 Plaintiffs contend that the Consent Order, which was signed by Ms.
28 Jensen-Ames, satisfies the requirements of subsection (B).

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1 For the same reasons the Court found that the Consent Order
2 could not satisfy subsection A of Section 523(a)(19), the Court
3 concludes that the Consent Order may not stand as the judgment,
4 order or settlement agreement under Section 523(a)(19)(B). The
5 question then becomes, however, whether the bankruptcy court can
6 enter a complying judgment or order under the "any Federal
7 proceeding" language of (i), or must the judgment or order be
8 entered by a nonbankruptcy court?

9 Ms. Smith relies on *Frost v. Civiello (In re Civiello)*, 348
10 B.R. 459 (Bankr. N.D. Ohio 2006). Like the plaintiff in this case,
11 the plaintiff in *Civiello* did not have a pre or post petition
12 judgment or order establishing the debtor's obligation to the
13 plaintiff. Instead, the *Civiello* court indicated at the end of its
14 opinion that it would enter the judgment that would satisfy Section
15 523(a)(19)(B) based upon the defendant's strict liability under
16 state law. Defendants contend that subsection (B) can be satisfied
17 only by a judgment or order from a nonbankruptcy court, citing *In*
18 *re Jafari*, 401 B.R. 494 (Bankr. D. Colo. 2009). See also *Speck v.*
19 *Demers*, 2009 WL 3681675 (Bankr. E.D. Wash. 2009); *Holland v.*
20 *Zimmerman (In re Zimmerman)*, 341 B.R. 77, 80 (Bankr. N.D. Ga.
21 2006).

22 As originally enacted, Section 523(a)(19) required a
23 prepetition judgment, order or settlement establishing the debtor's
24 liability. Thus, there was no issue about the bankruptcy court
25 being the court to enter the judgment referenced in the statute.
26 In 2005, Congress amended the language of the statute as part of
27 the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
28 by adding "results, before, on, or after the date on which the

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1 petition was filed, from...." Based upon this change, Ms. Smith
2 argues that the removal of the requirement of a prebankruptcy
3 determination authorizes the Court to determine both the underlying
4 liability and to enter a judgment of nondischargeability.

5 *Jafari* relies heavily on the legislative history to Section
6 523(a)(19) in concluding that the 2005 amendment was not intended
7 to permit the bankruptcy court to determine the underlying
8 liability. That conclusion, however, flies in the face of the
9 unambiguous language of the statute which proclaims broadly that a
10 judgment or order entered in "any Federal or state
11 judicial...proceeding" before, on or after the petition date
12 satisfies Section 523(a)(19)(B). If anything, the overriding goal
13 of the amendment to the statute was to expand the rights of victims
14 of securities fraud to prevent the discharge of their debts by
15 holding "accountable those who violate securities laws" and by
16 eliminating the requirement that victims obtain a judgment
17 establishing the debt prior to bankruptcy. See S. Rep. No. 107-146
18 at 2, 10 (2002).

19 Other courts have concluded, as this Court does, that the
20 clear language of Section 523(a)(19)(B) permits the bankruptcy
21 court to establish the debtor's liability for a securities
22 violation. See *In re Chan*, 355 B.R. 494, 504 (E.D. Penn. 2006);
23 *Jansma v. Jansma*, 2010 WL 282511 (Bankr. N.D. Ill. 2010).
24 Moreover, in the Ninth Circuit, the bankruptcy court's jurisdiction
25 to enter a judgment establishing the monetary amount of a claim in
26 connection with making a nondischargeability determination is not
27 in question. *Sasson v. Sokoloff (In re Sasson)*, 424 F.3d 864 (9th
28 Cir. 2005), *cert. denied*, *Sasson v. Sokoloff*, 547 U.S. 1206 (2006).

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1 The *Jafari* court acknowledged its authority to determine liability
2 for fraud under Section 523(a)(2), where no prior state court
3 determination had been made, and attempted to distinguish the
4 language of that statute from Section 523(a)(19). This Court
5 respectfully disagrees with that analysis, and, based upon the
6 Ninth Circuit's broad interpretation of the bankruptcy court's
7 authority to make determinations of liability in connection with
8 dischargeability determinations, concludes that it may enter a
9 summary judgment in favor of plaintiff Smith as to Ms. Jensen-Ames'
10 liability for a securities violation.

11 Washington law provides for strict liability where a person
12 offers or sells a security without registration and in violation of
13 RCW 21.20.140. RCW 21.20.430(1). Under the strict liability
14 provision, RCW 21.20.430(1), Ms. Jensen-Ames is liable for any
15 "consideration paid for the security, together with interest at 8%
16 per annum from the date of payment, costs, and reasonable
17 attorneys' fees."³ Based upon the foregoing, the Court finds that
18 Ms. Jensen-Ames is liable to plaintiff Smith in the amount of
19 \$17,000, plus the other amounts allowable under RCW 21.20.430(1).

20 **3. The Liability of Mr. Ames.**

21 Washington law imposes joint and several liability "to the
22 same extent as the seller" on third-party agents who "materially
23 aid" in the transaction. RCW 21.20.430(3). Although plaintiffs
24

25 ³ Defendants contend that because Ms. Smith made only a down
26 payment on the investment of \$17,000 and failed to pay the entire
27 balance of \$50,000, she defaulted under her investment contract.
28 Because the Court finds that the investment was unlawful under
Washington state securities laws, the fact that Ms. Smith never
paid the full amount due under the investment agreement is
irrelevant.

1 contend there is no question that Mr. Ames materially aided the Los
2 Congos transaction, the evidence does not support that contention.
3 In her declaration, Ms. Smith does not describe any specific
4 contact with Mr. Ames in connection with the Los Congos investment.
5 Although she contends that Mr. Ames had an ownership investment in
6 Guidant Financial Group, which is referenced in some of the emails
7 (e.g., Ex. A, Smith Decl.), there is no evidence of such an
8 ownership interest by Mr. Ames. Accordingly, the Court finds that
9 plaintiff Smith is not entitled to summary judgment against
10 Mr. Ames personally.

11 However, under Washington law, a debt incurred by either
12 spouse during the marriage is presumptively a community debt. *Oil*
13 *Heat Co. of Port Angeles, Inc. v. Sweeney*, 25 Wash. App. 351, 353,
14 613 P.2d 169 (1980). There is no dispute that Mr. Ames and
15 Ms. Jensen-Ames were married during all of the events related to
16 the Los Congos transaction. Mr. Ames has not provided any evidence
17 to rebut the presumption that the obligation to Ms. Smith is a
18 community debt. Ms. Smith is therefore entitled to summary
19 judgment against the defendants' marital community.

20 **E. The Claim of Defendant Gelber.**

21 The facts related to the Seaside Mariana project share some
22 similarities with the Los Congos project. The Seaside Marina
23 project was marketed by Ms. Jensen-Ames in her emails as a group
24 investment in a large real estate project. See p. 3, *supra*. The
25 Seaside project required substantial involvement from third parties
26 to develop the project in order to provide a return to the
27 investors. Mr. Gelber, however, entered into a transaction that
28 entitled him to exercise an option to purchase a specific lot in

1 the Seaside Mariana development. Gelber Decl., Ex. D, Ex. E. The
2 Letter of Intent (Ex. D) and the Option Agreement to Acquire
3 Purchase Rights (Ex. E) look more like a traditional real estate
4 transaction, however, in contrast to the documents related to the
5 Los Congos project. The purchase option agreement is between Mr.
6 Gleber's IRA and Nicaragua Horizons, LLC, a Washington limited
7 liability company. On the other hand, the Lot Reservation and
8 Priority Position Agreement between Nicaragua Horizons LLC and the
9 Gelber IRA makes it clear that: "this Agreement is neither an offer
10 to sell nor a sale of the Lot or the Property, that the Lot or the
11 Property may or may not be available for sale, and that prior to
12 the execution of the Option Agreement, this Agreement may be
13 cancelled by either party upon written notice to the other party."
14 Jensen-Ames Decl, Ex. K, ¶ 7. Further, evidence of the group
15 nature of the investment is found in the Offer to Purchase between
16 Nicaragua Developments S.A. (the seller) and Nicaragua Horizons LLC
17 (the purchaser), in that pursuant to the agreement, the purchaser
18 agreed to acquire the entire project for a purchase price of
19 \$350,000. *Id.*, Ex. L. Plaintiffs put nothing in the record,
20 however, that the funds of many investors were in fact pooled in
21 connection with the purchase of the project.

22 On this record, the Court finds that there are disputed issues
23 of material fact as to whether the Seaside Marina investment was
24 made in connection with a "common enterprise" or that the efforts
25 of Ms. Jensen-Ames were "fundamentally significant ones that
26 affected the investment's success or failure." Accordingly, Mr.
27 Gelber's motion for summary judgment as to the Seaside investment
28 will be denied.

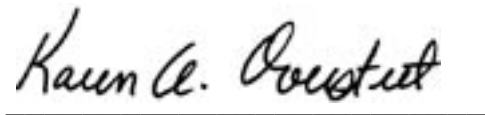
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CONCLUSION

For the foregoing reasons, the Court finds that plaintiff Smith is entitled to summary judgment against Ms. Jensen-Ames and her marital community for amounts dictated under RCW 21.20.430(1). The Court finds that plaintiff Gelber is not entitled to summary judgment against the defendants. Plaintiffs may submit an order consistent with this ruling.

DATED this 29th day of March, 2011



Judge Karen A. Overstreet